

Brigham Young University Law School BYU Law Digital Commons

Utah Supreme Court Briefs

2001

Devon Gee v. Samuel Smith : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Vernon B. Romney; Attorney General; Attorney for Respondent.

Lynn R. Brown; Salt Lake Legal Defender Association; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *Gee v. Smith*, No. 14012.00 (Utah Supreme Court, 2001).

https://digitalcommons.law.byu.edu/byu_sc2/1137

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

RECEIVED
LAW LIBRARY

DEC 9 1975

IN THE SUPREME COURT OF THE
STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

DEVON GEE
Appellant

-vs-

SAMUEL SMITH, Warden,
Utah State Prison
Respondent

:

:

Case No. 14012

:

:

BRIEF OF APPELLANT

This is an appeal from a Memorandum Order denying
the Petition for a Writ of Habeas Corpus, the Honorable
Stewart M. Hanson, Sr. presiding.

LYNN R. BROWN
Salt Lake Legal Defender Association
343 South 6th East
Salt Lake City, Utah
Attorney for Appellant

VERNON B. ROMNEY
Attorney General, State of Utah
236 State Capitol Building
Salt Lake City, Utah
Attorney for Respondent

FILED

JUN 3 1975

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE.....	1
DISPOSITION IN THE LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	2
POINT I. THE APPELLANT WAS DENIED A FAIR AND IMPARTIAL TRIAL WHEN DURING A RECESS OF THE TRIAL A MEMBER OF THE JURY WAS SHOWN A PHOTOGRAPH OF THE VICTIM IN ITS COFFIN.....	2

CASES CITED

State v. Ahrens, 25 Utah 2d 222, 479 P. 2d 786 (1971)	4
State v. Anderson, 65 Utah 415, 237 P. 941 (1925)	3
State v. Crank, 105 Utah 332, 142 P. 2d 178 (1943)	4
State v. Gee, 28 Utah 2d 96, 498, P. 2d, 662 (1972)	1, 2
State v. Morgan, 23 Utah 212, 64 P. 356 (1901)	3

OTHER AUTHORITIES CITED

Constitution of State Of Utah, Article I, Section 12	5
Constitution of United States, Sixth and Fourteen Amendments ...	5
Utah Code Annotated, Section 77-1-8, (1953)	5

IN THE SUPREME COURT OF THE
STATE OF UTAH

DEVON GEE
Appellant

-vs-

SAMUEL SMITH, Warden,
Utah State Prison
Respondent

:

:

Case No. 14012

:

:

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant is appealing from a memorandum decision of the Third Judicial District Court denying his petition for a writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

Thomas Devon Gee was convicted of First Degree Murder. This Court upheld the conviction in State v. Gee, 28 Utah 2d 96, 498 P. 2d 662 (1972). Subsequently, a petition for a writ of coram nobis was heard by the Honorable D. Frank Wilkins who denied the petition on January 30, 1973. This Court upheld the decision of Judge Wilkins on the

grounds that a corum nobis proceeding was an improper action. State v. Gee, 28 Utah 2d 96, 498 P. 2d, 662 (1972). A petition for a writ of habeas corpus was filed and heard before the Honorable Stewart M. Hanson and denied in a memorandum decision of February 13, 1975.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's decision.

STATEMENT OF FACTS

A juror, Mrs. Lola Bertul, testified that a lady claiming to be a grandparent showed her a photograph of a baby in a coffin. (R. 476) This was the picture of the alleged murder victim for which the appellant was tried and convicted. The picture was shown to the juror during a recess of the trial.

ARGUMENT

POINT I

THE APPELLANT WAS DENIED A FAIR AND IMPARTIAL TRIAL WHEN DURING A RECESS OF THE TRIAL A MEMBER OF THE JURY WAS SHOWN A PHOTOGRAPH OF THE VICTIM IN ITS COFFIN.

As a result of the incident involving a member of the jury in Appellant's case, Appellant maintains he was denied a trial by a fair and impartial jury. Therefore, Appellant should be granted the relief

requested, a writ of habeas corpus ordering Appellant's sentence set aside.

The Supreme Court of Utah set forth the rule to be applied to jury misconduct in the case of State v. Morgan, 23 Utah 212, 64 P. 356 (1901), in which two persons expressed bias to others prior to their selection as jurors, and yet maintained they were impartial and unbiased during voir dire examination. In reversing the murder conviction and granting a new trial, the Supreme Court stated:

The cases are numerous which hold that misconduct by one or more of the jury, which might have been prejudicial to the accused, raises the presumption, especially in a capital case, that the accused has been prejudiced thereby, and vitiates the verdict, unless the prosecution shows beyond reasonable doubt that the prisoner has received no injury by reason thereof. 64 P. at 360.

The principle that jury misconduct raises a presumption of prejudice to the defendant has been applied in numerous subsequent cases. In the case of State v. Anderson, 65 Utah 415, 237 P. 941 (1925), a member of the jury rode to and from the courthouse each day during the trial with one of the prosecution witnesses. Both the juror and the witness swore that they did not discuss the case during these rides, and the juror claimed that the rides did not influence his verdict. Regardless, the Supreme Court of Utah reversed defendant's conviction for grand larceny on the basis he had been denied a trial by a fair and impartial jury. The Court in so holding stated:

The authorities, however, all agree that any conduct or relationship between a juror and party to an action during a trial that would or might, consciously or unconsciously, tend

to influence the judgment of the juror authorizes and requires the granting of a new trial, unless it is made to appear affirmatively that the judgment of the juror was in no way affected by such relationship, or that the parties by their conduct waived their right to make objection to such conduct. 237 P. at 943

In the case of State v. Crank, 105 Utah 332, 142 P. 2d 178 (1943), a juror and a witness for the prosecution engaged in a discussion immediately prior to the submission of the case to the jury. Both claimed they were merely renewing an old friendship and were not discussing the case. The Supreme Court, in reversing the conviction for second degree murder, stated:

In spite of these extenuating circumstances, this conduct is certainly improper, particularly in capital cases, where the life or liberty of the defendant is at stake. In such cases, the verdict of the jury, like Caesar's wife, must be above suspicion. 142 P. 2d at 179

In the recent case of State v. Ahrens, 25 Utah 2d 222, 479 P. 2d 786 (1971), one of the jurors visited the city offices where the defendant worked and made an independent investigation of the layout of the offices and talked with the city treasurer and other employees of the office.

The Supreme Court reversed the conviction for embezzlement, stating:

If the efficacy of the jury system is to be preserved, the courts cannot permit individual jurors to make private and individual investigations of the facts of the case they are impaneled to decide. We have no way of determining whether or not the conduct of the juror influenced his judgment in arriving at a verdict. We adhere to the rule stated in prior decisions of the court that the law requires of the juror such conduct during the time that his verdict may be above suspicion as to it having been influenced by any conduct on his part during the trial. 479 P. 2d at 787

The situation in Appellant's case is somewhat dissimilar to the facts in the authorities cited above in that the juror in Appellant's case was not at fault. However, the fact that the juror here did not initiate the prejudicial contact does not vitiate the prejudice created thereby. In view of the objective standard established by the authorities cited above, the events which transpired at Appellant's trial clearly raise the presumption of prejudice and lack of impartiality on the part of the juror involved.

WHEREFORE, Appellant contends that he was denied trial by a fair and impartial jury in violation of his rights under Article I, Section 12 of the Constitution of the State of Utah, Section 77-1-8, Utah Code Annotated, (1953), and the Sixth and Fourteenth Amendments to the Constitution of the United States. Appellant respectfully requests that a writ of habeas corpus be granted.

Respectfully submitted,

LYNN R. BROWN
Attorney for Appellant

**RECEIVED
LAW LIBRARY**

DEC 9 1975

**BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School**